

United States Court of Appeals For the First Circuit

No. 02-1882

97-071 (PG)

UNITED STATES OF AMERICA,

Appellee,

v.

JOSE L. DIAZ-FONTANEZ,

Defendant, Appellant.

Before

Torruella, Selya, and Lipez, Circuit Judges.

JUDGMENT

Entered: December 29, 2005

We reject appellant's claims of plain error in the district court's delegation to the probation officer of the authority to decide the number of drug tests to be performed during the term of supervised release. See United States v. Padilla, 415 F.3d 211 (1st Cir. 2005) (en banc). Similarly, there was no plain error in the delegation of the decision regarding drug treatment in the event of a positive drug test result. See United States v. Sanchez-Berrios, 424 F.3d 65, 82 (1st Cir. 2005).

Although this is a close case, we view the record as raising a sufficient probability of a more lenient sentence under advisory guidelines to meet the test of United States v. Antonakopoulos, 399 F.3d 68, 78 (2005). See United States v. Bradley, 426 F.3d 54 (1st Cir. 2005). We note that the court permitted the parties to stipulate to a version of the guidelines that would result in a lower sentence and that the court expressed the view that it was constrained by the guidelines. On remand, the court will have the

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opportunity to reconsider all factors relevant to the sentence, including the calculation of appellant's criminal history given appellant's challenge to the current validity of his prior Puerto Rico conviction for escape from a treatment facility, conduct which, he argues, is no longer a crime under Puerto Rico law. We intimate no view as to the appropriate sentence to be imposed on remand.

The sentence is vacated and the case is remanded for further proceedings consistent with this judgment.

By the Court:

Richard Cushing Donovan, Clerk.

MARGARET CARTER

By: _____
Chief Deputy Clerk.

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FIRST CIRCUIT COURT OF APPEALS
BOSTON, MA

By: DF Date: 12/29/5

[Certified Copies: Honorable Juan M. Perez-Gimenez, Frances DeMoran, Clerk, USDC of Puerto Rico]

[cc: Timothy Vasquez, AUSA, Thomas Klumper, ASUA, Sonia Torres-Pabon, AUSA, Marlene Aponte-Cabrera, Esq.]